Supreme Court, U.S.
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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

DALE E. REICH,

Petitioner,

v.

MICHAEL SPELLMAN, ASSISTANT CHANCELLOR, UNIVERSITY RELATIONS, UNIVERSITY OF WISCONSIN-WHITEWATER, JAMES R. CONNOR, FORMER CHANCELLOR, UNIVERSITY OF WISCONSIN-WHITEWATER, and BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN SYSTEM,

Respondents.

Petition For A Writ of *Certiorari*
To The Court of Appeals
For The State of Wisconsin, District II

PETITION FOR WRIT OF *CERTIORARI*

For The Petitioner:

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179pp

QUESTIONS PRESENTED

I. Regarding the petitioner's first amendment 42 U.S.C. § 1983 "whistle blower" claim and the respondents' claim of qualified immunity:

A. Whether the petitioner's interest in protected speech involving (1) a state university's policy of conditioning business contracts on "contributions," and (2) a university administrator's order to a subordinate to intentionally lie if questioned about the policy, outweighed the respondents' "confidentiality interest";

B. Whether it was clearly established in 1991 that state university administrators could not retaliate against a subordinate who refused to obey a superior's order to lie to an interested member of the general public about the university's policy, possibly in violation of state bidding regulations and state and federal law, of punishing local businesses which did not make financial contributions to a university fund-raising campaign by denying them university business; and

C. What constitutes a genuine dispute as to material fact such that summary judgment is precluded, and what is the proper method and degree of analysis that should be applied in determining whether a dispute is material?

II. Regarding Wisconsin's statutory notice-of-claim requirements:

A. Whether, if the Wisconsin Court of Appeals is correct in holding that the petitioner did not comply with the statutory notice requirements, those requirements as applied resulted in an unconstitutional deprivation of the petitioner's right to due process as guaranteed by the 14th Amendment; and

B. Whether, in light of the intervening case of DNR v. City of Waukesha, 184 Wis. 2d. 178, 198, 515 N.W.2d 888 (1994), the equal protection and due process clauses of the 14th Amendment to the United States Constitution require that substantial rather than strict compliance be required?

LIST OF PARTIES

Petitioner Dale E. Reich was the plaintiff/appellant in the proceeding below. Respondents Michael Spellman, James R. Connor, and Board of Regents of the University of Wisconsin System were defendants/respondents in the proceeding below.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

LIST OF PARTIES ii

LIST OF APPENDICES v

TABLE OF AUTHORITIES vii

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF WISCONSIN, DISTRICT II 1

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 10

I. THE COURT OF APPEALS ERRED IN GRANTING THE RESPONDENTS' MOTION FOR SUMMARY JUDGMENT BASED UPON QUALIFIED IMMUNITY. 10

TABLE OF CONTENTS (CONTINUED)

A. THE PETITIONER'S INTEREST IN PROTECTED SPEECH INVOLVING (1) A STATE UNIVERSITY'S POLICY OF CONDITIONING BUSINESS CONTRACTS ON "CONTRIBUTIONS," AND (2) A UNIVERSITY ADMINISTRATOR'S ORDER TO A SUBORDINATE TO INTENTIONALLY LIE IF QUESTIONED ABOUT THE POLICY, OUTWEIGHED THE RESPONDENTS' "CONFIDENTIALITY INTEREST". 10

B. IT WAS CLEARLY ESTABLISHED IN 1991 THAT A GOVERNMENT EMPLOYER COULD NOT RETALIATE AGAINST AN EMPLOYEE WHO REFUSES TO OBEY THE EMPLOYER'S ORDER TO LIE ABOUT AN ETHICALLY AND LEGALLY QUESTIONABLE POLICY. 17

C. BOTH LOWER COURTS ERRED IN FAILING TO ISOLATE AND ANALYZE NUMEROUS DISPUTED FACTS AS TO THEIR MATERIALITY. 19

II. THE COURT OF APPEALS ERRED IN AFFIRMING THE TRIAL COURT'S DISMISSAL OF THE PETITIONER'S STATE CLAIM. 22

A. WIS. STATS. § 893.82 AS APPLIED DEPRIVED THE PETITIONER OF HIS RIGHT TO DUE PROCESS. 22

TABLE OF CONTENTS (CONTINUED)

B. EVEN IF THE "TRIGGERING DATE" FOR NOTICE OF CLAIM WAS JANUARY 31, 1991, IN LIGHT OF THE INTERVENING CASE OF DNR V. CITY OF WAUKESHA, EQUAL PROTECTION AND DUE PROCESS REQUIRE THAT SUBSTANTIAL RATHER THAN STRICT COMPLIANCE BE REQUIRED TO COMPLY WITH NOTICE REQUIREMENTS. 24

CONCLUSION 30

LIST OF APPENDICES

DOCUMENT(S) — APPENDIX PAGE

Court of Appeals Decision Dated and Released June 1, 1994 . . . . . A-1

Supreme Court of the State of Wisconsin's Denial of Petition For Review B-1

Memorandum Decision On Defendant State'[s] Motion For Summary Judgment, Circuit Court, Walworth County, Hon. John R. Race, Dated April 28, 1993 . . . . . C-1

Affidavit of Dale E. Reich, Dated October 29, 1992 . . . . . D-1

APPENDICES (CONTINUED)

Second Affidavit of Dale E. Reich
(With Selected Attached Exhibits A - I)
Dated December 21, 1992 . . . . . E-1

United States Constitutional
Provisions Involved F-1

42 U.S.C. § 1983 . . . . . G-1

Wisconsin Statutes Involved H-1

News Coverage and (Inaccurate)
University Memorandum and Press
Release Following Decision by the
Court of Appeals I-1

[Excerpt From Companion Jefferson
County] Memorandum Decision [On
Petitioner's Appeal of An Adverse
Unemployment Compensation Ruling] J-1

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT CASES:

Anderson v. Creighton,
483 U.S. 635 (1987) . . . . . passim

Bazemore v. Friday,
478 U.S. 385 (1986) 22, 23, 24

Connick v. Myers, 461 U.S. 138 (1983) 14

Delaware State College v. Ricks,
449 U.S. 250 (1980) 22, 23, 24

Harlow v. Fitzgerald,
457 U.S. 800 (1982) 20

Loving v. Virginia,
388 U.S. 1 (1967) 26

Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle,
429 U.S. 274 (1977) 20

Rankin v. McPherson,
483 U.S. 378 (1987) 14

Siegert v. Gilley,
500 U.S. 226 (1991) 16

Wood v. Strickland,
420 U.S. 308 (1975) 19

TABLE OF AUTHORITIES (CONTINUED)

OTHER FEDERAL CASES:

Auriemma v. Rice,
910 F.2d 1449 (7th Cir. 1990) 17

Beavers v. American Cast Iron Pipe Co.,
975 F.2d 792 (11th Cir.1992) 22

Beiluch v. Sullivan,
999 F.2d 666 (2nd Cir. 1993) 15

Broderick v. Roache,
996 Fed.2d at 1299 20

Conner v. Reinhard,
847 F.2d 384 (7th Cir.),
cert. denied, 477 U.S. 856 (1988) 14

Czurlanis v. Albanese,
721 F.2d 98 (3d Cir. 1983) 13

Dunn v. Carrol,
40 F.3d 287 (8th Cir. 1994) 15

Elliott v. Thomas,
937 F.2d 338 (7th Cir. 1991) 16

Feliciano-Angulo v. Rivera-Cruz,
858 Fed.2d 40 (1st Cir. 1988) 20

Green v. Carlson,
826 F.2d 647 (7th Cir. 1987) 21

TABLE OF AUTHORITIES (CONTINUED)

Hall v. Ryan,
957 Fed. 2d 402 (7th Cir. 1992) 18

Hanson v. Bennett,
948 Fed.2d 397 (7th Cir. 1991) 20

Hicks v. City of Watonga,
942 F.2d 737 (10th Cir.1991) 15

Jeffries v. Turkey Run Consolidated School Dist.,
492 F.2d 1 (7th Cir. 1974) 26

Jones v. Peruit & Mauldin,
808 Fed. 2d 1435 (11th Cir.) vac'd in part
on other grounds on her'g, 822 F.2d 998
(11th Cir.), reh'g en bank granted,
833 F.2d 1436 (11th Cir. 1987) 19

Lewis v. City of Ft. Collins,
903 F.2d 752 (10th Cir.1990). 15

Lowell v. Glidden-Durkee, Div. of SCM Corp.,
529 F.Supp. 17 (1991) 22

Martinez v. City of Opa-Lock, Fla.,
971 F.2d 708 (11th Cir.1992) 13

Nereida-Gonzalez v. Tirado-Delgado,
990 Fed. 2d 701 (1st Cir. 1993) 21

Pasquino v. Prather,
13 F.3d 1049 (7th Cir. 1994) 21

TABLE OF AUTHORITIES (CONTINUED)

Rodriguez-Pinto v. Tirado-Delgado,
982 Fed. 2d 34 (1st Cir. 1993) 21

Rookard v. Health and Hospitals Corp.,
710 F.2d 41 (2d Cir. 1983) 13

Schiller v. Moore,
30 F.3d 1281 (10th Cir. 1994) 15

Soltani v. Smith,
812 F.Supp. 1280 (D.N.H. 1993) 18

Thompkins v. Vickers,
26 F.3d 603 (5th Cir. (1994) 16

Walter v. Morton,
33 F.3d 1240 (10th Cir. 1994) 15

Webb v. Indiana Nat. Bank,
931 F.2d 434 (7th Cir.1991) 22

STATE CASES:

Barnhill v. Board of Regents,
166 Wis. 2d 395, 479 N.W.2d 917 (1991) . . . passim

Broome v. Truluck,
270 S.C. 227, 241 S.E.2d 739 (1978) 27

Burkes v. Klauser,
185 Wis. 2d 309, ___ N.W. ___ (1994). . . . . passim

TABLE OF AUTHORITIES (CONTINUED)

Carson v. Maurer,
424 A.2d 825 (1980) 27

Daily v. Wis. University, Whitewater,
145 Wis. 2d 756, 429 N.W.2d 83 (1988) 24

DNR v. City of Waukesha,
184 Wis. 2d. 178, 515 N.W.2d 888 (1994) . . passim

Figgs v. City of Milwaukee,
121 Wis. 2d 44, 357 N.W.2d 548 (1984) 26

Fujioka v. Kam,
55 Hawaii 7, 514 P.2d 568 (1973) 27

Grams v. Boss,
97 Wis.2d 332, 294 N.W.2d 473 (1980) 21

Henderson Clay Products v. Edgar Wood, Etc.,
451 A.2d 174 (N.H. 1982) 27

Kallas Millwork Corp. v. Square D. Co.,
66 Wis.2d 382, 225 N.W.2d 454 (1975) 27

Loyal Order of Moose, Lodge 1785 v. Cavaness,
563 P.2d 143 (Okla. 1977) 27

Reich v. State Highway Department,
386 Mich. 617, 194 N.W.2d 700, (1972) 27

Renner by Brennan v. Madison General Hosp.,
151 Wis. 2d 855, 447 N.W. 2d 97 (App.1989)
review denied 451 N.W. 2d 297 26

TABLE OF AUTHORITIES (CONTINUED)

Skinner v. Anderson,
38 Ill.2d 455, 231 N.E.2d, 588 (1967) 27

FEDERAL AND STATE STATUTES:

42 U.S.C. § 1983 . . . . . i, 2, 7

Wis. Stats. § 230.80 17

Wis. Stat. § 893.80 . . . . . passim

Wis. Stat. § 893.82 . . . . . passim

Wis. Stats. § 895.65 17

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF WISCONSIN, DISTRICT II

Petitioner, Dale E. Reich, respectfully prays that a writ of certiorari issue to review the judgment and opinion of Court of Appeals for the State of Wisconsin, District II, affirming the Walworth County Circuit Court's grant of summary judgment to the defendants on the basis of qualified immunity and the petitioner's alleged failure to comply with statutory notice-of-injury requirements.

OPINIONS BELOW

The unpublished written opinion of the Court of Appeals for the State of Wisconsin, District II, appears in the appendix to this petition at pages A-1 - A-18. The decision affirmed an unpublished written judgment of the Circuit Court for Walworth County which appears in the appendix at pages C-1 to C-27.

JURISDICTION

The April 28, 1993 Memorandum Decision of the Walworth County Circuit Court granting the respondents' Motion for Summary Judgment, was timely appealed by the petitioner to the Court of Appeals for the State of Wisconsin, District II, which had jurisdiction pursuant to Wisconsin Statutes § 808.03. The Court of Appeals decision affirming the circuit court was filed on June 1, 1994. A timely Petition for Review of the Court of Appeals decision was filed in the Supreme Court of the State of Wisconsin on July 1, 1994, by the petitioner. The Wisconsin Supreme Court's denial of the Petition for Review was issued on November 16, 1994. See B-1, *infra*. The United States Supreme Court's jurisdiction is invoked under title 28 U.S.C. § 2104 and 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment and the Due Process and Equal Protection clauses of the Fourteenth Amendment to the United States Constitution are reprinted in the Appendix hereto at page F-1, *infra*. 42 U.S.C. § 1983 is reprinted in the Appendix hereto at page G-1, infra. Wisconsin Statutes §§ 893.80, 893.82 and 895.65 are reprinted in the Appendix hereto at page H-1, *infra*.

STATEMENT OF THE CASE

Petitioner, Dale E. Reich, seeks damages under state statute and federal common law and civil rights statutes for actions taken by the respondents, including a job transfer and demotion, in retaliation for his exercise of protected speech. Reich became Director of News and Publications at the University of Wisconsin at Whitewater (hereafter "University") in July, 1978. Reich served in this position for approximately 11 years. During his tenure, Reich consistently received favorable appraisals from his superiors, was honored with numerous awards and citations, regularly had his appointment renewed, and received numerous and generous pay raises. R-23:3-4; D-3 to D-5[1]. A review of Reich's personnel file indicates that at no time during these 11 years did he ever receive negative written feedback regarding his job performance from either the then-Chancellor, respondent Connor, or from his immediate supervisor, then-Assistant Chancellor Kay Woit. Id.

Reich functioned relatively autonomously and with a small staff under Ms. Woit. R-23:2; D-2. In 1988 or 1989, when Ms.

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[1]References to the "Record" as prepared by the circuit court clerk and submitted to the Court of Appeals are presented as "R-(specific record cite)." References to appendices A through J attached to this petition begin with the corresponding letter followed by the page number: e.g., "A-1" or "D-10".

Woit resigned. the petitioner, upon the request of respondent Connor, assumed the position of Acting Assistant Chancellor of University Relations. This appointment, along with the aforementioned favorable appraisals and pay increases, reflected the satisfaction of then-Assistant Chancellor Woit and respondent Connor with Reich's long-term job performance. Reich initially expressed an interest in a permanent appointment as Assistant Chancellor, but changed his mind since the job involved "almost exclusively. . . fund-raising." Id. Respondent Spellman was eventually hired.

During 1990 and 1991, Spellman and his staff were engaged in a fund-raising campaign to fund a multi-purpose university auditorium. During the course of these efforts, respondent Spellman informed the Reich that The Whitewater Register (hereafter, "The Register"), a publication enterprise in the City of Whitewater, and other local businesses including the Nelson Bus Company (R-21;335), would be penalized with the loss of University business because they did not make what respondent Spellman considered to be an adequate contribution to the auditorium fund-raising campaign. R-41:1-2; E-1 to E-2. Spellman told Reich that the purpose of the new policy of conditioning University contracts with local business on contributions was to "teach these people [businesses] downtown a lesson." R-21:348.

Wanting to avoid embarrassment however, Spellman directed that the "lesson" not be expressly communicated to the intended recipients. Spellman told Reich that, if asked by anyone from The Register, Reich was to lie by claiming that the loss of business was based solely on poor quality of work. R-41:1-2; E-1 to E-2.

Pursuant to Spellman's policy, The Register was subsequently denied the opportunity to bid to renew a printing contract they had with the University. Despite personal misgivings about the propriety of Spellman's policy, Reich

initially attempted to abide by it. R-23:7; D-8. When contacted by phone by Tom Coe of The Register who asked why he was not allowed to bid, Reich initially replied as directed by respondent Spellman, claiming the decision was based solely on poor quality. R-23:7; D-8; R-41:1-5; E-1 - E-2. Uncomfortable with this fabrication, Reich immediately called Coe back and admitted that he had not been truthful and that the real reason for The Register's loss of business was that Coe had not sufficiently contributed to the auditorium project. R-41:2; E-2.

Although Reich, as Director of News and Publications, had numerous contacts in the news media, he did not "go public" with, leak, or broadcast potentially embarrassing information about the legally and ethically questionable University policy. Rather, in a limited manner, he disclosed the policy to a clearly interested member of the general public who initiated the inquiry and who had a right to an honest answer from a public employee.

Still, Reich's superiors were infuriated by the disclosure and a progressive series of retaliatory actions against Reich ensued, beginning with a reprimand by both respondents Spellman and Connor. R-41:3; E-2 - E-3. During a meeting to discuss the disclosure, Connor advised Reich that regardless of his feelings about the propriety of Spellman's actions, Reich would be required to obey the Spellman's directions. R-23:4-5; D-6 - D-6. Respondent Connor admonished Reich, stating "it is not up to you to take Mike's [Respondent Spellman's] dirty laundry downtown." R-21:338. Immediately following the meeting, Spellman threatened Reich with unnamed impending action, which turned out to be the involuntary physical relocation to another "office" (a converted storage space) and accompanying isolation and ostracism. R-23:5-6; D-6 - D-7.

Following the verbal reprimand, Reich decided that, under the circumstances, he could no longer continue to work under Spellman's supervision and he attempted to resign. Id. He was persuaded however by then-Chancellor Connor to allow the

Chancellor to secure alternative comparable employment for him within the University. But instead of obtaining such a job for Reich, Connor wrote to Reich on January 31, 1991 stating (a) that Reich's resignation was now being accepted, effective June 30, 1991, but (b) that Connor would continue to attempt to find Reich another job with the University. R-41:Ex.A; E-10 - E-12. Thus, the equivocal threat of termination was coupled with an offer to find Reich another job.

A series of negotiations and communications involving Reich, his attorney, the respondents, and their counsel ("general counsel" for the University of Wisconsin System, Charles Stathas) took place during the winter and spring of 1991 (see Argument II(B), *infra*). Then, on June 18, 1991, Respondent Connor wrote to Reich, informing him that he "will be assigned" to another department and that his annual salary "will be" an amount approximately $15,000 less than it had been. R-41:7 and Ex.H; E-6 and E-30 - E-32. (emphasis added). Connor also told Reich that he should "plan to report [to his new job] on July 1, 1991." Id. The involuntary, coercive nature of the transfer was confirmed during Reich's subsequent telephone with then newly-appointed Chancellor Gaylon Greenhill who indicated that Reich could either accept his reassignment or be fired. R-41:7-8; E-6.[2]

The retaliatory actions against Reich thus culminated in June of 1991 with his involuntary and arbitrary transfer and demotion to another job that required substantially different training and responsibilities than he had in his old job and

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[2]The respondents characterize the contents of Connor's letter as "a gratuitous [job] offer", a claim contradicted by the record. The "offer" clearly does not, for example, allow for voluntary acceptance or rejection by petitioner. Rather, Connor's letter compelled "acceptance" by directing that Reich "will be assigned" and when to "plan to report". Finally, while it is clear from the record that Reich was not interested in the position "offered" (R-23: 5; D-5 - D-6) and refused to sign the contract (E-33 - E-34) provided by Connor (R-41:7; E-6), Greenhill nevertheless confirmed the transfer (R-41:7-8 and Ex.I; E-6 and E-35).

resulted in a substantial drop in pay. This "fresh wrong" caused Reich to experience humiliation and intense emotional and financial strain which necessitated psychological treatment. R-23:5-7; D-5 to D-7.

Reich complied with statutory notice requirements when he filed his Notice of Claim on September 30, 1991, exactly 90 days after the event causing the injury, namely the June 30 transfer, demotion, and reduction in pay. A-15. Further notice of claim was provided prior to the petitioner's last day of work. See Argument II(B), *infra*.

At the time the appellant disclosed information to The Register, he reasonably believed that respondent Spellman's policy violated state laws or bidding procedures, constituted an abuse of his authority, and may have resulted in a substantial waste of public funds. R-41:3-4; E-2 to E-4. The appellant viewed respondent Spellman's actions as a "strong arm tactic" and "morally wrong". R-21:532. Reich also believed the actions to be in violation of fund-raising ethical standards. R-41:3-4; E-2 to E-4. (The respondents do not contend anywhere in their voluminous court filings that respondent Spellman acted ethically; rather, the thrust of their strategy has been to attack the petitioner's motives or the reasonableness of his actions.)

Extensive media coverage of this case has confirmed both the public's interest and Reich's belief that he was being retaliated against for disclosing information that he "reasonably believe[d]" demonstrated a violation of state regulations or law and represented an "abuse of authority in state government."[3] In

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[3]Wis. Stats. § 895.65(1)(d). See, also, the Circuit Court Memorandum Decision in the companion unemployment case, J-1 - J-2 (suggesting that bidding requirements should have been abided by). The alumni paper printed by the Register is funded with money funnelled through the University's fund-raising arm, the "University of Wisconsin - Whitewater Foundation" (hereafter, "Foundation"). Documents submitted in circuit court establish that the relationship

addition to changing the criteria for selecting subcontractors by adding the requirement that they be contributors to the University, respondent Spellman's directive also changed the University policy and practice of adhering to state bidding procedures as it had in the past.

The petitioner's 42 U.S.C. § 1983 and state statutory claims were timely and properly raised in the circuit court for Walworth County, Wisconsin. With regard to the civil rights claim, the circuit court, granted the respondent's motion for summary judgment on the following basis: "(1) The plaintiff has established no clear right; and (2) considering the employer's needs, the ambiguous nature of the employer's acts, the need for confidentiality when dealing with the supplier, the need for loyalty and confidence". R-43:10; C-16. With regard to the 120-day notice issue associated with the petitioner's state claim, the court granted the respondent's motion for summary judgment on the basis that "[w]hile plaintiff argues he was negotiating in discussing this matter with University officials, it is [the court's]

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between the University and Foundation is such that the petitioner's belief that state bidding rules, which had been adhered to in the past, should have been followed was reasonable (and probably correct). R-40:23-29. The Foundation is both directly and indirectly subsidized by the taxpayers of Wisconsin: it is provided on-campus facilities and a "sweetheart lease" (R-41:Ex.O); and Foundation "staff" are paid from the University's payroll (the Foundation's Executive Director [respondent/"Assistant Chancellor" Spellman], for example, who spends the majority of his working day engaged in fund-raising activities (R-38:2-5), is paid primarily by the University (he receives a gratuity of $5,000.00 per year from the Foundation, while the University pays him $67,876.00). R-41:Ex.N. Other University personnel are engaged in a wide range of Foundation activities including records maintenance (R-41:Ex.P); production of publications; planning and conducting fundraising campaigns and events; and procurement of subcontracts. With the exception of the nominal fee paid to respondent Spellman, none of the state employees who do Foundation work are compensated by the Foundation. R-41:Ex.N. and Ex.P. Rather, they are paid out of public revenues. In sum, the Foundation and the public University enjoy a symbiotic relationship that results in an inextricable intertwining of their funds, personnel, policies, and practices.

opinion that the triggering date is January 31, 1991; and, therefore, no timely notice was given". R-43:15, C-27.

In affirming the circuit court on the issue of qualified immunity, the Wisconsin Court of Appeals held that "the defendants are entitled to qualified immunity because the law in 1991 was not clearly established that Reich's [protected speech] interests outweighed those of the defendants". A-12.[4] A Petition for Review of the Court of Appeals decision was filed by the petitioner in the Supreme Court of the State of Wisconsin on July 1, 1994 and denied on November 16, 1994.

With regard to the 120 day notice issue, the court of appeals concluded that the plaintiff "reasonably should have known that the defendants may have been retaliating against him for his exercise of free speech when he received the January 31, 1991 letter of termination." The petitioner's due process and "substantial compliance" arguments relating to § 893.82 were raised in the trial court and Wisconsin Court of Appeals, but both courts declined to directly address them.[5] These same arguments

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[4]Subsequent to the court of appeals decision in the instant case, the Wisconsin Supreme Court, in Burkes v. Klauser, summarized the "*relevant* inquiry" in assessing a qualified claim: "whether a reasonable state official could have believed his or her act was constitutional 'in light of clearly established law and information [he or she] possessed at the time of the official's action.'" 185 Wis. 2d 309, 327, ___ N.W. ___ (1994) (emphasis added) (citing Anderson v. Creighton, 483 U.S. 635, 641 (1987). The author of the Burkes decision, Justice Shirley S. Abrahamson, did not participate in the Wisconsin Supreme Court's review of the Petition for Review in this case, or in another decision involving the University of Wisconsin, Barnhill v. Board of Regents, 166 Wis. 2d 395, 420, 422, 479 N.W.2d 917 (1991), discussed *infra* at 15.

[5]Although the petitioner did not frame his notice of claim arguments using the "due process" parlance, the issue raised by the petitioner in the circuit court and again in the court of appeals is one of due process; it is a firmly established principal that, notice of claim statutes require "only substantial, and not strict, compliance" so as "to preserve bona fide claims." See Argument II(B), *infra*.

have been supplemented, based upon an intervening Wisconsin Supreme Court decision, in Reich's Petition For Review to the state Supreme Court and again in this petition.[6]

Even though the petitioner suffered in June and July, 1991, injuries different in kind and degree than the one threatened in January of that year, the Court of Appeals nevertheless held that notice of the June transfer and demotion was provided by the January threatened firing. Without comment or analysis, the Court of Appeals thus declined to address the petitioner's "fresh wrong" argument. See Argument II(A), *infra*.

The Petition for Review of the Court of Appeals decision was timely filed by the petitioner in the Wisconsin Supreme Court. Because the petition was denied (B-1), this Petition for Writ of Certiorari arises from the decision by the Wisconsin Court of Appeals, District II, dated June 1, 1994.

Also, as the petitioner argued in the State Court of Appeals, in the case of a continuing violation (as opposed to a present consequence of a 1-time violation), the period of time for a statutory notice of injury rightly begins on the date of the last injury. See Argument II(A), *infra*. To the extent, as in this case, that a statute is construed so as to deny a "bona fide claim" based either on the petitioner's failure to strictly comply with the statute or on the incorrect conclusion regarding the date of the event causing the injury, the petitioner has been denied due process under the Fourteenth Amendment in that he has been refused his right to press his bona fide claim in court.

[6]The equal protection issue is raised herein by the petitioner for the first time because it only became ripe for consideration with the Wisconsin Supreme Court's intervening decision, *subsequent* to the Court of Appeals decision in the instant, in DNR v. City of Waukesha, 184 Wis. 2d. 178, 198, 515 N.W.2d 888 (1984). See Argument II(B), *infra*.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS ERRED IN GRANTING THE RESPONDENTS' MOTION FOR SUMMARY JUDGMENT BASED UPON QUALIFIED IMMUNITY.

A. THE PETITIONER'S INTEREST IN PROTECTED SPEECH INVOLVING (1) A STATE UNIVERSITY'S POLICY OF CONDITIONING BUSINESS CONTRACTS ON "CONTRIBUTIONS," AND (2) A UNIVERSITY ADMINISTRATOR'S ORDER TO A SUBORDINATE TO INTENTIONALLY LIE IF QUESTIONED ABOUT THE POLICY, OUTWEIGHED THE RESPONDENTS' "CONFIDENTIALITY INTEREST".

By purportedly basing their holdings on the application of the Pickering[7] balancing test, both the circuit court and the Wisconsin court of appeals implicitly concede that the petitioner's speech touched on a matter of public concern and was therefore protected (R-43:9; C-16 and A-12 - A-14, respectively).[8] In applying the Pickering factors, however, the court of appeals found, incredibly, (1) that the respondents had a *legitimate* "interest in confidentiality"[9] in the policy of punishing local

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[7]Pickering v. Board of Education, 391 U.S. 563 (1968).

[8]See, also, the Memorandum Decision in the companion unemployment benefits case, *supra*, J-1 - J-2, where the court concluded that the petitioner's "[d]isclosure of such a potential harm is *in* the State's interest, not against it" (emphasis added).

[9]The court of appeals relied nearly exclusively, but incorrectly, on the Wisconsin Supreme Court's fact-specific holding in Barnhill v. Board of Regents, 166 Wis. 2d 395, 409-10 (1991), where the plaintiff potentially contaminated an on-going research project by allowing a reporter to examine the survey questions.

businesses who did not "contribute" to the University and with respondent Spellman's order that the petitioner lie about it, and (2) that this supposed interest "weighs against Reich's free speech interest." A-13. Thus, the court found that the respondents had an overriding "confidentiality interest" in both an ethically and legally questionable policy change *and* in their order to an employee to intentionally mislead the public if asked about it.

This remarkable result raises serious questions. First, can the respondents legitimately have a "confidentiality interest" based solely on the fact that disclosure of an ethically and legally questionable practice might embarrass them or that it might strain a relationship between certain public officials and the disclosing employee? Second, should such an "interest" outweigh and effectively smother an employee's protected speech interest? If the answer to these questions is "yes", then virtually every whistleblower who is later punished for the disclosure of the matter for public concern will be left without remedy since the government's interest in not being embarrassed would outweigh the public's interest in the dissemination of the information.

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166 Wis. 2d at 404. The court emphasized that "confidentiality. . . [was] necessary to assure valid research results" and that the research laboratory (employer) "[could not] effectively function if it is unable to enforce its confidentiality rules." Id. at 411. In the instant case, however, the respondents can claim neither to have had a legitimate "confidentiality" interest based solely on avoiding embarrassment relating to an ethically and legally questionable policy or that the disclosure of the policy in any way impacted the University's ability to function. Indeed the fund-raising campaign in question was successfully completed and the auditorium has since been built.

Also, the instant case is distinguishable from Barnhill with regard to the "time, place, and manner" of the petitioner's disclosure (had the plaintiff in Barnhill only discussed his concerns with the reporter and not released survey questions, the impact on the employer's interest would have been lessened). In contrast to the employee in Barnhill, Reich neither contacted the media or took the initiative in "going public"; rather, he simply responded honestly when asked about the objectionable policy.

In addition to its dubious conclusion that the respondents had a legitimate confidentiality interest, the court of appeals erred in failing to afford the petitioner's speech sufficient weight. After finding, contrary to the record, that the petitioner asserted only his belief that the university's policy was "immoral",[10] the court concluded, against the great weight of precedent, that an employee's interest in free speech involving "only. . . ethical concerns" should be afforded "less weight" than "when illegal conduct is exposed." A-14. As recently as this past June, however, Wisconsin's own Supreme Court, subsequent to the state court of appeals decision in the instant case, expressly reiterated the long-established rejection of the notion that an employee's speech must involve "illegal conduct" or the virtual equivalent thereof:

> An accusation of illegality is not required to render statements of apprehension about the use of public monies a matter of a public concern; and allegation of waste can rise to that level. . . . Moreover, even if the. . . suspicions were subsequently demonstrated to be incorrect, absent proof of false statements knowingly or recklessly made the plaintiff's speech in a matter of public concern is entitled to First Amendment protection.

Burkes v. Klauser, 185 Wis. 2d 309, 336, ___ N.W. ___ (1994)

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[10]The court of appeals simply mischaracterizes Reich's beliefs regarding the propriety of the policy. At the time of Reich's disclosure, Reich believed that the policy constituted mismanagement and an abuse of his authority, and may have resulted in a substantial waste of public funds. R-41:3-4; E-2 - E-4. Reich viewed respondents' policy as a "strong arm tactic" and "morally wrong". R-21:532. Reich also believed the actions to be in violation of fund-raising ethical standards. R-41:3-4; E-2 - E-4. Based upon his own fund-raising training and experience (R-23:2-5; D-2 - D-5), Reich found the University's conditioning of its business on contributions to be unfair and in violation of the public trust. Thus, the record makes clear that Reich neither approved of the policy nor was prepared to lie about it.

(emphasis added; additional citations omitted). See, also, Rookard v. Health and Hospitals Corp., 710 F.2d 41 (2d Cir. 1983); Czurlanis v. Albanese, 721 F.2d 98, 104 (3d Cir. 1983). As the 10th circuit observed, "[s]peech that seeks to expose improper operations of the government or questions the integrity of governmental officials clearly concerns vital public interests." Conaway v. Smith, 853 F.2d 789, 797-98 (10th Cir. 1988).

The only relevant inquiry for the court is thus whether Reich could reasonably have believed that a public concern was implicated by the policy. Given that state bidding, expenditure, and disclosure rules were clearly implicated, there can be little doubt that the speech touched on matters of public concern. Irregularities in public bidding procedures are clearly of public concern. Martinez v. City of Opa-Lock, Fla., 971 F.2d 708, 712 (11th Cir.1992). Moreover, though not irrefutable evidence of a public concern, the intense press coverage and subsequent "damage control" efforts by the University clearly suggest that the public has an interest in whether a major public university was, as a matter of policy, engaging in the fund-raising equivalent of a shakedown operation and ordering its employees conceal it.[11]

The court of appeals' conclusions about other governmental

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[11]See I-1 - I-30. As noted by current University Chancellor Gaylon Greenhill, the court of appeals decision generated a "media barrage". I-26. As part of the resulting damage control effort (and in a transparent effort to "chill" future disclosure by employees of ethically questionable policies), the University disseminated inaccurate information in a widely-distributed internal memorandum and a press release. In the memo, Greenhill, ignoring the fact that the respondents twice *threatened* to fire the petitioner, wrongly asserts that the petitioner "*claim[ed]* that he was 'fired'". I-26 - I-27 (emphasis added). In the press release, the University resurrects the discredited claim, long-since abandoned by the respondents, that it was the unilateral actions of the *petitioner* (rather than respondent Spellman's policy) that resulted in the cancellation of The Register's printing contract. I-28 - I-29.

interests associated with effective office functioning are likewise unconvincing. Discussing the respondents wild and unsubstantiated claims regarding office disruption and the time, place, and manner of petitioner's speech, the court of appeals *theorizes* that the plaintiff's disclosure "damaged any close and personal working relationship that he may have had. . ." with his superior. A-13 (emphasis added). Placing aside for a moment the clearly speculative nature of the courts statement, even where, unlike in this case, defendants in a whistleblowing case establish some degree of disruption of a "working relationship" as a result of a plaintiff's speech, "[judicial] deference to the employer's judgment" in taking "remedial" is only appropriate "when close working relationships are essential to fulfilling public responsibilities". Connick v. Myers, 461 U.S. 138, 151-52 (1983); *cf.* Pickering, 391 U.S. at 569-73 (where there was no close working relationship between the speaker and the retaliating party, and consequently no impact on operations "beyond the tendency to anger the [latter]").

In the case at bar, Reich and Spellman never enjoyed a "close working relationship", before or after Reich's disclosure. In fact, the respondents admit that "[s]hortly after Spellman [was hired] he and Reich were at odds with each other". R-19:7. Yet, the two functioned effectively in their individual roles until Spellman felt the need to retaliate against Reich. Nor was there any showing that any "actual, material and substantial harm to [the employer's] operations... result[ed from Reich's] speech",[12] much less that "office harmony was shattered" as claimed by the respondent in circuit court (but abandoned in the court of

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[12]Barnhill, 166 Wis. 2d at 419-20 (citing Rankin v. McPherson, 483 U.S. 378, 388-89 (1987), and Conner v. Reinhard, 847 F.2d 384, 391 (7th Cir.), cert. denied, 477 U.S. 856 (1988)).

appeals[13]). The fact that respondent Connor and later Chancellor Greenhill failed to verify allegations of office disruption in his their transfer memos (R-41:Ex.H; E-30 - E-31; 41:Ex.I; E-35 - E-36) lends credence to the petitioner's claims that the real motivation was retaliation. Beiluch v. Sullivan, 999 F.2d 666, 672 (2nd Cir. 1993).

Thus, the court's "findings" regarding the impact of Reich's speech are "merely speculative." Barnhill v. Board of Regents, 166 Wis. 2d 395, 420, 479 N.W.2d 917 (1991). In fact, Reich indicated that his presence in the office was not "at all disruptive" (R-21:463) and went on to testify that it was respondent Spellman's treatment of staff that made things "difficult." R-21:464; R-23:8. Meanwhile, *the respondents* characterize Reich's relationship with Connor as "still. . . good" (R-19:8). Moreover, given that there clearly exists a dispute as to the material question of whether the petitioner's speech created a disruption in the workplace, the granting of summary judgement was improper. See Dunn v. Carrol, 40 F.3d 287, 293 (8th Cir. 1994); Schiller v. Moore, 30 F.3d 1281, 1284 (10th Cir. 1994).

Also, a prima facie showing that a defendant may have proper reasons for the challenged conduct "does not alone invoke qualified immunity. . . ." Walter v. Morton, 33 F.3d 1240 (10th Cir. 1994). The focus "remains of whether the plaintiff has produced facts property evidencing improper intent" Id. (additional citations omitted). In the case at bar, there is ample evidence that the respondent's actions were improperly motivated.[14] Both respondents Connor and Spellman reprimanded the petitioner, Connor ordering him to obey the

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[13]Compare the respondent's circuit court brief (R-19:28-29) with their subsequent brief in the court of appeals, p. 35.

[14]Hicks v. City of Watonga, 942 F.2d 737, 749 (10th Cir.1991) (quoting Lewis v. City of Ft. Collins 903 F.2d 752, 758 (10th Cir.1990).

Spellman's orders regardless of his feelings about their propriety. R-23:4-5; D-5 - D-6. Immediately after Connor admonished Reich, stating "it is not up to you to take Mike's [Respondent Spellman's] dirty laundry downtown" (R-21:338), Spellman threatened the petitioner with unnamed action, which turned out to be an involuntary relocation of the petitioner's office to an isolated, converted storage room. R-23:5; D-5. Then, after the possibility of "disruption" was eliminated by the respondent's ostracizing and isolation of the petitioner, a termination was threatened (R-41:Ex.A; E-10 - E-11) and, several months later, Reich received notice that he would be transferred and demoted (R-41:Ex. H; E-30 - E-31). Clearly, in presenting uncontested evidence of the preceding facts, the petitioner established that he "has the kernel of a case in hand." Elliott v. Thomas, 937 F.2d 338, 345 (7th Cir. 1991).[15]

Thus, the court of appeals' conclusion that "a reasonable public official could believe that Reich's breach of confidentiality, disruption of a close and personal working relationship, and [the] time, place, and manner of speech were sufficient to permit his reprimand" is at once both mystifying and irrelevant. A-13 (emphasis added). Aside from the fact that there was no "close and personal working relationship" between the petitioner and respondent Spellman to be "disrupted" and no concomitant showing of "office disruption," the court fails to indicate how the factors it cites justified the numerous separate and disciplinary actions above and beyond the initial "reprimand," taken against the petitioner, culminating in his arbitrary transfer and demotion.

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[15]Since the Supreme Court's decision in Siegert v. Gilley, 500 U.S. 226 (1991), every federal circuit that has considered the question has concluded that a plaintiff is not required to come forward with "direct, as opposed to circumstantial evidence" of an illegitimate intent in order to overcome a public official's claim of qualified immunity. Id., 500 U.S. at 235 (Kennedy, J., concurring). In addition to Elliott, see, e.g., Thompkins v. Vickers, 26 F.3d 603, 608-09 (5th Cir. (1994).

B. IT WAS CLEARLY ESTABLISHED IN 1991 THAT A GOVERNMENT EMPLOYER COULD NOT RETALIATE AGAINST AN EMPLOYEE WHO REFUSES TO OBEY THE EMPLOYER'S ORDER TO LIE ABOUT AN ETHICALLY AND LEGALLY QUESTIONABLE POLICY.

As noted above, both the circuit court and the court of appeals concede that the petitioner's speech regarding a new University policy (contrary to public bidding rules traditionally applied) of conditioning contracts with local businesses on "contributions" and of intentionally misleading the public about the policy was a matter of public concern worthy of some degree of protection under the first amendment. Thus, the pertinent inquiry for each court should have been whether it was clearly established in 1991 that state university administrators could not retaliate against a subordinate who refuses to obey a superior's order to lie to an interested member of the general public about the policy.

Protection of whistle blowing was recognized by statute in Wisconsin as early as 1983 and protected as early as 1985. Wis. Stats. § 230.80 et. seq., and § 895.65. The Wisconsin Supreme Court concluded in 1991, that by 1985 ". . . there was already a wealth of case law on a public employee's First Amendment right to speak on matters of public concern"; it was thus "clearly established" that a state official may not retaliate against an employee in any way that infringes on the employee's constitutionally protected interest. Barnhill, 166 Wis. 2d at 409-10.

Qualified immunity does not protect official action simply because it had not previously been held unlawful; rather, it is only required that the unlawfulness of the action be apparent in light of pre-existing law. Anderson v. Creighton, 483 U.S. 635, 639-40 (1987); Auriemma v. Rice, 910 F.2d 1449, 1455-56 (7th

Cir. 1990). The "clearly established" inquiry does not require the existence of analogous cases "involving the exact fact pattern of the case at bar." Burkes, 185 Wis. 2d at 332, ___ N.W. __ (1994) (relying on Anderson, 483 U.S. at 639). Actions taken by public officials "are considered objectively unreasonable. . . if the right allegedly violated is clearly established in a sufficiently particularized sense at the time of the actions at issue". Hall v. Ryan, 957 Fed.2d 402, 404 (7th Cir. 1992).

Moreover, an official who has ready access to legal advice and who has received particularized training or can be assumed to have advanced administrative skills may fairly be held to a higher standard of knowledge of the applicable constitutional law. Soltani v. Smith, 812 F.Supp. 1280, 1303 (D.N.H. 1993). Thus, if the "reasonableness" element of the analysis is to have any meaning at all, then the question to be answered is not whether any reasonable person would have viewed the actions of the respondents as violative of the appellant's constitutional rights, but rather whether a reasonable person in like circumstances, namely high-ranking administrators of a state-run university (specifically, the Chancellor and Assistant Chancellor), would have been sufficiently aware of the law under the circumstances to know that their actions violated it.

In the instant case, there is little doubt that the respondents were aware of their legal standing by June of 1991 when the petitioner was transferred and demoted. Throughout the preceding winter and spring, a series of negotiations took place involving Reich, his attorney, the respondents, and their counsel occurred. See Argument II(B), *infra*. Respondents' counsel Stathas apparently continued to provide on-going counsel to the respondents through June of 1991, as evidenced by the fact that he was "copied" on at least one of respondent Connor's letters to Reich. R-41:Ex. H; E-30 - E-31. Additionally, the respondents, at no personal expense, could and eventually did utilize the legal expertise and assistance of the state Attorney General's office.

Thus, the respondents, who had free and ample access to legal counsel "who should have explained. . . the import" of existing law to them, should have been found to have been in a position to reasonably know or be expected to know that their conduct was unconstitutional. Jones v. Peruit & Mauldin, 808 Fed.2d 1435, 1442 (11th Cir.) vacated in part on other grounds on her'g, 822 F.2d 998 (11th Cir.), reh'g en bank granted, 833 F.2d 1436 (11th Cir. 1987); see, also, Wood v. Strickland, 420 U.S. 308, 331 (1975) (Powell, J., concurring in part and dissenting in part). As high-ranking state university administrators with ready access to taxpayer subsidized legal advice, the respondents should be held to a commensurate standard of knowledge of applicable law. The court of appeals should therefore have found that the law with regard to the petitioner's speech and retaliatory job transfers was clearly established at the time of the respondents' actions.

C. BOTH LOWER COURTS ERRED IN FAILING TO ISOLATE AND ANALYZE NUMEROUS DISPUTED FACTS AS TO THEIR MATERIALITY.

Various facts in dispute are material in that relate directly to the respondents' intentions and motives. R-24:7-20; (appeal) Brief of Petitioner-Appellant, 12-26. In their trial court brief, the respondents incorrectly claimed that:

> (1) the sole target [of the petitioner's speech] was [his] immediate supervisor; (2) the speech was nothing other than the disclosure of a confidence; (3) the expression of loyalty and the need for discipline were needlessly ruptured . . .;
> (4) the [petitioner] admits that office harmony was shattered.

R-19:41. Each of these wild, unsupported assertions are contested and material in that they go to the key question of whether the respondents were, as they claim, motivated by a

desire to maintain effective office functioning (rather than by retaliation) and therefore could not have known their actions were "clearly unconstitutional". In Hanson v. Bennett, for example, the 7th Circuit held that it "lack[ed] jurisdiction over the issue of qualified immunity" since there was "a disputed factual question regarding [the state official's] purpose" in interfering with the plaintiff's speech right. 948 Fed.2d 397, 399-400 (7th Cir. 1991). As in the present case, the issue was whether the defendant "intended to suppress [the plaintiff's] speech or whether he genuinely believed that [he was] justified . . .". Id. In Broderick v. Roache, the 5th Circuit found that the actions of the defendant were "sufficient to create a genuine and material fact as to whether [the defendant] was motivated by desire to retaliate against [the plaintiff] for exercising his First Amendment rights" such that summary judgment based on qualified immunity was precluded. 996 Fed.2d at 1299 (relying on Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977).[16]

But while, in the case at bar, a material question of fact exists with regard to whether, in taking job actions against the petitioner, the respondents were motivated by retaliation or the desire to maintain office functioning, neither the circuit court nor the court of appeals articulated a rationale in support of their conclusions that disputed facts were not material. In fact, neither

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[16]The defendants motivation was also taken into account in denying a summary judgment motion in Feliciano-Angulo v. Rivera-Cruz, 858 Fed.2d 40 (1st Cir. 1988). Reviewing at length the impact of Harlow v. Fitzgerald, 457 U.S. 800 (1982), the court expressly found "no merit" in argument that the Supreme Court in Harlow intended to "render immaterial any inquiry into the defendant's state of mind, even where, as here the defendant's motivation in effecting the discharge is an essential element of the plaintiff's constitutional claim." 858 Fed.2d at 45. The court also rejected the defendant's invitation to accept *his* version of the motivation behind the plaintiff's dismissal since such an interpretation of Harlow would permit "'an official to be granted qualified immunity as a matter of law even though the principal disputed question of fact in the case -the true purpose of intent motivating the officials conduct - remains unresolved.'" Id. at 45-46 (citation omitted).

court made any express, particularized findings regarding the disputed facts identified by the petitioner. Instead, the circuit court compounded its failure to determine the materiality of disputed facts by acknowledging that material disputes do exist, noting at one point that "[t]here is no lack of controversy as to the facts and the parties' motivations" (R-43:4-5; C-6) (emphasis added) and that "[t]his could then readily become a three-way issue and a jury would be called upon to sort these claims out" (R-43:6; C-9). Likewise, the court of appeals acknowledged the existence of "several factual disputes", but without explanation deemed them immaterial. A-7.

The courts' failure to isolate and analyze "disputed material facts, or undisputed material facts from which reasonable alternative inferences may be drawn"[17] is alone enough to require a remand. Pasquino v. Prather, 13 F.3d 1049 (7th Cir. 1994).[18]

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[17]Grams v. Boss, 97 Wis.2d 332, 338, 294 N.W.2d 473 (1980)

[18]The Wisconsin Supreme Court has also cautioned against "look[ing] at the law in the abstract" in applying "the test for qualified immunity"; "[r]ather, the test. . . is whether the law was clear in relation to the specific facts confronting the defendants at the time of the action." Burkes, 185 Wis. 2d at 331, __ N.W.2d __ (citing Anderson, 483 U.S. at 639-40); and Green v. Carlson, 826 F.2d 647, 649 (7th Cir. 1987)). An examination of relevant circumstances is no less relevant in cases involving a retaliatory transfer or demotion (as opposed to dismissal). See, e.g., Nereida-Gonzalez v. Tirado-Delgado, 990 Fed.2d 701 (1st Cir. 1993); and Rodriguez-Pinto v. Tirado-Delgado, 982 Fed.2d 34 (1st Cir. 1993).

II. THE COURT OF APPEALS ERRED IN AFFIRMING THE TRIAL COURT'S DISMISSAL OF THE PETITIONER'S STATE CLAIM.

A. WIS. STATS. § 893.82 AS APPLIED DEPRIVED THE PETITIONER OF HIS RIGHT TO DUE PROCESS.

In interpreting and applying notice-of-claim statutes, it is well established that, in a case of a continuing violation, the period for filing a charge begins on the date of the last injury. Bazemore v. Friday, 478 U.S. 385 (1986). In deciding whether an employer's violations are of a continuous nature for statute-of-limitations purposes, a court must distinguish between a present consequence of a one-time violation, such as in Delaware State College v. Ricks, 449 U.S. 250 (1980), which does not extend the time limit, and a continuation of a violation into the present, which does, as in Bazemore. Beavers v. American Cast Iron Pipe Co., 975 F.2d 792, 796-800 (11th Cir.1992). The 7th circuit elaborated upon this distinction in Webb v. Indiana Nat. Bank, 931 F.2d 434, 438 (7th Cir.1991):

> . . . in the case of a continuing unlawful practice, every day that the practice continues is a fresh wrong for purposes of the statute of limitations. . . Did Ricks abolish this principle? We think not. We adopt the distinction . . . between the present consequence of a one-time violation and the continuation of the violation into the present.

(Citations omitted.) Thus, for a *continuing* violation, the period for filing a charge begins on the date of the last injury. Lowell v. Glidden-Durkee, Div. of SCM Corp., 529 F.Supp. 17, 20 (1991).

In the case at bar, the petitioner was first notified of a "fresh wrong" (his involuntary transfer and demotion) in a memo from respondent Connor dated June 18, 1991. R-41:Ex.H; E-30

- E-34. Given that the petitioner filed his Notice of Claim on September 30, 1991, well within the 120-days of the June "fresh wrong", the court of appeals should have found the notice to have been timely. It is beyond dispute that the highly equivocal "termination letter" from respondent Connor to the petitioner, dated January 31, 1991 (the termination was never carried out) and the June 1991 notice and subsequent transfer and demotion are distinctly different actions.

Yet, the court of appeals found that "notice of injury" was provided by the January letter. Thus ignoring Bazemore's "fresh wrongs" rule, the court erroneously applied the Ricks "continuing effects of a single injury" approach. By applying the more restrictive Ricks rule, the court affirmed a reading of § 893.82 that results in an unconstitutional deprivation of the petitioner's right to due process. If the court of appeals is correct, then the petitioner (and any plaintiff) is precluded from proceeding on a claim, *even if notice is filed within the 120-notice period*, solely because a *prior* injury occurring before the 120-day period, but different or distinct from the subsequent injury, may have occurred.

This is clearly antithetic to the principles enunciated by the Court in Bazemore. Moreover, such a constrained reading of a notice-of-claim statute clearly impacts a potential plaintiff's right to due process in that he is precluded from bringing a bona fide claim merely because a earlier, separate possible cause of action that was the subject of negotiations was not acted upon. Aside from being fundamentally unfair, such a reading of the notification statute virtually removes any incentive for defendants to take claims seriously and attempt to resolve them short of court action. (As noted below in Argument B, the petitioner's efforts to resolve this dispute continued through the spring of 1991.) To be free to take subsequent retaliatory action, all an employer need do is drag out negotiations beyond a perceived 120-day notice period associated with a prior "injury" (in this case, the highly equivocal *threat* of termination which was never carried out was

coupled with an offer to find the petitioner another job).

Thus, in addition to being contrary to due process, an overly broad application of the Ricks rule is contrary to public policy. Moreover, given the facts in this case, the rule enunciated in Bazemore line, rather than Ricks, should have controlled.

B. EVEN IF THE "TRIGGERING DATE" FOR NOTICE OF CLAIM WAS JANUARY 31, 1991, IN LIGHT OF THE INTERVENING CASE OF DNR V. CITY OF WAUKESHA, EQUAL PROTECTION AND DUE PROCESS REQUIRE THAT SUBSTANTIAL RATHER THAN STRICT COMPLIANCE BE REQUIRED TO COMPLY WITH NOTICE REQUIREMENTS.

On June 1, 1994, subsequent to the court of appeals decision in the instant case, the Wisconsin Supreme Court, in DNR v. City of Waukesha, 184 Wis. 2d 178, 515 N.W.2d 888 (1994), reaffirmed the principle that substantial rather than strict compliance satisfy the notice-of-claim requirements set forth in § 893.80 for actions "brought or maintained against any . . . political corporation, government subdivision or agency thereof nor against any officer, official, agent, or employee of [same] for actions done in their official capacity or in the course of their agency or employment." Similarly, in the case of § 893.82, an order dismissing a claim was reversed "on that ground" that the plaintiff had "substantially complied" with the statute. Daily v. Wis. University, Whitewater, 145 Wis. 2d 756, 762, 429 N.W.2d 83 (1988).[19]

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[19]The court in Daily deemed legislative changes to the notice of claim statute, including the addition of a provision directing that its provisions "shall be liberally construed to effectuate this intent" (paragraph 1(b)--see H-5, *infra*), as an attempt "to liberaliz[e]. . . the statute to avoid. . . harsh results. . .". Id., 145 Wis. 2d at 759, 761. Following the petitioner's injuries in this case, the legislature back tracked, deleting paragraph 1(b) and replacing it with paragraph

Nevertheless, if, at the time of the injuries to the petitioner during the fall of 1990 and first half of 1991, § 893.82 as it then existed is deemed to have required substantial rather than strict compliance, then the co-existence of §§ 893.80 and 893.82 raises equal protection concerns pertinent to this case. First, which statute applies when a claim is made against both a *"governmental body"* (in this case, the Board of Regents of the University of Wisconsin), thereby triggering § 893.80, and *state employees* purportedly covered under § 893.82.[20] (Moreover, are University Administrators considered "officers" under § 893.80?) Given that (a) the petitioner is clearly in the process of suing a governmental body (the Board of Regents) and University "officers" (the current assistant chancellor and former chancellor), rather than simply state "employees", and that (b) the acts which have given rise to this claim were performed by the officials "in their official capacity or in the course of their agency or employment," the issue of the adequacy of notice received by the respondents should arguably have been decided under § 893.80 rather than § 893.82.

Secondly, in light of the decision in DNR v. City of Waukesha, it is clear that the co-existence of §§ 893.80 and 893.82 raises both equal protection and due process[21] concerns

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(2m) which expressly requires strict compliance. 1991 ACT 39, §§ 3579 TO 3582, effective August 15, 1991.

[20]Although § 893.80 purports to cover "[c]laims against government bodies or officers, agents or employees. . ., given the co-existence of § 893.82, which regulates "[c]laims against state employees", one reading of § 893.80 is that it applies only to municipal-level employees or other government employees other than state employees.

[21]At a minimum, substantive due process requires legislation be fair and reasonable in content as well as application. "[T]he reason for the deprivation [of a right to the excluded class] may not be so inadequate that the judiciary will characterize it as 'arbitrary'". Jeffries v. Turkey Run Consolidated School Dist., 492 F.2d 1, 3-4 (7th Cir. 1974).

which, given the intervening nature of the case and its implications for the petitioner, are now ripe for review. The equal protection clause requires consideration of whether a statutorily created classification constitutes arbitrary discrimination. Loving v. Virginia, 388 U.S. 1 (1967). Thus, when one statute, to a plaintiff's detriment, arbitrarily exempts *state* employees from liability by affording them a greater degree of procedural protection than is afforded to other public employees, equal protection is implicated.

Essentially, § 893.82 creates a "protected class" of *state* governmental employees, who have for some reason been deemed worthy of greater protection than other governmental employees and potential plaintiffs. The obvious question, considering the co-existence of two notice-of-injury statutes that provide difference levels of protection for municipal and state employees (and different barriers for those attempting to prosecute a claim against one or the other) is: Why should state employees be entitled to greater protection (and potential plaintiffs be denied bona fide claims[22]) in comparison to municipal and other

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[22]Section 893.80 is clearly more flexible and "pro-plaintiff" than § 893.82. If, for example, a claimant does not literally comply with § 893.80 the claim does not necessarily fail so long as "the [municipality] had actual notice. . . and the claimant shows. . . that the delay or the failure to give the requisite notice had not been prejudicial to the [municipality]." DNR v. City of Waukesha, 184 Wis. 2d at 197 (quoting from § 893.80(1)(a)). The court soundly reasoned that "notices of claim should be construed so as to preserve bona fide claims. . . . "[I]n furtherance of this policy, only substantial, and not strict, compliance with notice statutes is required." Id. at 198.

In contrast, even before § 893.82's compliance standards were explicitly legislatively heightened in 1991 (see note 19, *supra*), for claims against a state employees under that section (as opposed to against a municipal employee under §893.80), substantial compliance may not have been sufficient. Renner by Brennan v. Madison General Hosp., 151 Wis. 2d 855, 447 N.W. 2d 97 (App.1989) review denied 451 N.W. 2d 297. It has also been held that non-compliance with requirements of § 893.80 must be plead as the defense by a municipality. Figgs v. City of Milwaukee, 121 Wis. 2d 44, 53, 55-56, 357

governmental employee employees (and plaintiff with claims against them)? Numerous jurisdictions have recognized that distinctions resulting from notice statutes that immunize a particular class of defendants are unconstitutionally discriminatory if they create an arbitrary and unreasonable classification.[23]

Statutory notice of claim requirements must "fairly and substantially relate to [a] legitimate legislative objective." Carson v. Maurer, 424 A.2d 825, 834 (1980); see, also, Reich v. State Highway Department, 386 Mich. 617, 623, 194 N.W.2d 700, 702 (1972). The Wisconsin Supreme Court has emphasized that "'the purpose of the notice of claim statute is to afford the municipality an opportunity to compromise and settle [the] claim without litigation.'" 184 Wis. 2d at 195 (quoting Figgs v. City of Milwaukee, 121 Wis. 2d 44, 53, 357 N.W.2d 548 (1984) [additional citations omitted]). Although the court was referring to § 893.80, the same purpose rationally should and, according to the legislature does, apply to § 893.82.[24]

Given that §§ 893.80 and 893.82 share the same statutory (and public policy) objective, and that, in the case of § 893.80 *substantial* rather than strict compliance has been found to be in furtherance of that objective, the suggestion that, for some

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N.W.2d 548 (1984).

[23]See, e.g., Henderson Clay Products v. Edgar Wood, Etc., 451 A.2d 174 (N.H. 1982); Fujioka v. Kam, 55 Hawaii 7, 12, 514 P.2d 568, 571-72 (1973); Skinner v. Anderson, 38 Ill.2d 455, 459-60, 231 N.E.2d, 588, 590-91 (1967); Loyal Order of Moose, Lodge 1785 v. Cavaness, 563 P.2d 143, 148 (Okla. 1977); Broome v. Truluck 270 S.C. 227, 230-31, 241 S.E.2d 739, 740 (1978); Kallas Millwork Corp. v. Square D. Co., 66 Wis.2d 382, 383-84, 225 N.W.2d 454, 455 (1975).

[24]Similarly, the purposes of § 893.82 include to provide the state Attorney General "with adequate time to investigate claims" and "with an opportunity to effect on a compromise without a civil action". § 893.82(1)(a)(1) and (2); H-5.

unexplained reason, the opposite is true for § 893.80 is, on its face, dubious. Absent any articulable or apparent rationale for this distinction, the pertinent inquiry in light of the DNR v. City of Waukesha decision is whether, by establishing different standards for bringing suit against government officials based solely on whether potential defendants work directly for the state as opposed to some other governmental agency, § 893.80 and § 893.82 violate the petitioner's right to equal protection and due process under the 14th Amendment.

Assuming arguendo that the court of appeals was correct in defining the injury date as January 31, 1991, it can be observed, without diminishing or relinquishing the petitioner's "fresh wrong" argument, that the petitioner would obviously have an easier burden establishing substantial compliance with notice-of-claim requirements, as required by § 893.80, as compared with establishing strict compliance, as required by § 893.82. As argued by the petitioner in his Petition For Review filed in the Wisconsin Supreme Court (pages 28-35), substantial compliance with notice requirements was provided in the instant case by two letters from petitioner's counsel, Russell W. Devitt, to respondent then-Chancellor Connor, dated April 2, 1991 (R-41:Ex.E.; E-20 - E-22) and May 7, 1991 (R-41:Ex.G.; E-25 - E-29), within 120 days of the so-called January 31 "triggering date". These letters clearly satisfy the criteria, as set forth in DNR v. City of Waukesha, 184 Wis. 2d at 198, for establishing substantial compliance. In that case, as in the instant, case prior to the official filing of claim, the parties, entered into negotiations in an effort to resolve the matter. Although those negotiations ultimately did not bear fruit, the court concluded that "[c]learly, after four years of negotiations, the city had actual notice of the claim and was not prejudice by the state's failure to give the requisite notice." 184 Wis. 2d at 197.

Similarly, in the case at bar, the respondents were provided ample notice of claim, both in the form of letters from Attorney Devitt (discussed below) and as a result of meetings during which

the actions that gave rise to the claim and possible resolutions were discussed with then Chancellor Greenhill and University counsel Charles Stathes, who remained involved in the University's handling of this case at least up to the petitioner transfer and demotion. R:41:Ex.H; E-30 - E-31. Moreover, the respondents acknowledge that they were notified on April 2 that Reich's rights had been "violated" (R-19:12) and on May 7 of the petitioners first amendment ("whistleblower") claim and the Reich would view any termination that resulted to be "without just cause." (R-19:13).

Thus, even if January 31, 1991 was the "triggering date" for § 893.82's notice requirement, the information required under § 893.82(3) was amply provided within 120 days of that date. Indeed, the respondents tacitly admitted that they had notice of both the nature and potential of a claim "adequate time to investigate claims" when, in their circuit court rebuttal brief, they stated that Attorney Devitt, subsequent to the January 31, 1991 memo, "complained bitterly and threatened legal action, which ultimately developed into this lawsuit." R-33:11.

It is sadly ironic that those efforts, which were in comport with the "purposes" of § 893.82, were ultimately held against the petitioner by the circuit court and court of appeals. Upon reflection, it appears that the respondents cynically factored the 120 day notice requirement into their decision to make the effective date of the so-called termination six-months past the notification date. This case thus raises the policy issue relating to a party's ability to manipulate § 893.82 to its own ends rather than to effectuate its purposes of providing adequate time to investigate a claim and reach a compromise.

CONCLUSION

For the reasons set forth above the Court should grant this Petition For Writ of *Certiorari*.

Respectfully submitted,

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